Before the
Federal Communications Commission
Washington, D.C. 20554

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| In the Matter of | ) | |
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| Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment | ) | WC Docket No. 17-84 |

**COALITION COMMENTS ON NOTICE OF INQUIRY**

The Coalition (defined below) respectfully submits these Comments in response to the April 21, 2017 Notice of Proposed Rulemaking, Notice of Inquiry ("NOI"), and Request for Comment of the Federal Communications Commission (the "Commission").[1]

The Coalition recognizes that the deployment of broadband infrastructure throughout their jurisdictions has led to economic development, job creation and improved lifestyle. These local governments recognize that broadband is vital to the economic and social well-being of their community and without adequate broadband facilities in place, they may be unable to meet the demands of their residents and businesses. The Coalition supports the goal of the Commission to accelerate the deployment of next-generation broadband networks, however, the Commission's NOI operating premise, that municipal laws, regulations and rights-of-way practices have the effect of prohibiting the provision of telecommunications and broadband services, is unsupported and contradicts the facts regarding deployment in the jurisdictions comprising the Coalition.

[1] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, PUBLIC NOTICE, WC Docket No. 17-84, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, FCC 17-37 (Apr. 21, 2017) (2017 Wireline Infrastructure Notice), *as modified by 2017 Wireline Infrastructure Notice*, PUBLIC NOTICE, WC Docket No. 17-84 DA-17-473 (May 16, 2017).

## I. INTRODUCTION

These comments are submitted on behalf of the City of Longview[2], the City of Seattle[3] and the City of Spokane[4], (collectively the "Coalition"). The population of the local governments comprising the Coalition totals 854,224[5]. The Coalition respectfully submits these Comments in response to the NOI.[6]

## II. RESPONSE TO NOTICE OF INQUIRY

The Coalition agrees with and supports the Commission's goal of promoting the deployment of broadband infrastructure.[7] Some of the actions identified in the NOI, however, do not adequately respect the obligations and associated powers of State and local governments over public property. Congress expressly identified these powers as outside of any federal preemption.[8]

States are obligated to hold rights-of-way in trust for the use of the public.[9] Title in public lands is "held in trust for the people of the state . . . freed from the obstruction or interference of private parties."[10] Although States may choose to allow private parties to use the public land, States cannot "abdicate [their] trust over property in which the whole people are interested . . . so as to leave them entirely under the use and control of private parties…."[11] Fulfilling the obligation to hold public property in trust for the use of the public requires securing

[2] The City of Longview, Washington consists of 14.79 square miles, 15,281 housing units and 36,648 residents.
[3] The City of Seattle, Washington consists of 142.50 square miles, 283,510 housing units and 608,660 residents.
[4] The City of Spokane, Washington consists of 60.02 square miles, 87,271 housing units and 208,916 residents.
[5] Based on 2010 census data.
[6] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, PUBLIC NOTICE, WC Docket No. 17-84, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, FCC 17-37 (Apr. 21, 2017) (2017 Wireline Infrastructure Notice), *as modified by 2017 Wireline Infrastructure Notice*, PUBLIC NOTICE, WC Docket No. 17-84 DA-17-473 (May 16, 2017).
[7] NOI at ¶ 100.
[8] 47 U.S.C. § 253.
[9] *See* Hague v. Committee for Industrial Organization, 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public….").
[10] Illinois Central R. Co. v. Illinois, 146 U.S. 387, 452 (1892).
[11] Id. at 453.

fair and reasonable compensation for the use and management of public rights-of-way. In adopting Section 253(c) of the Communications Act of 1935, Congress expressly confirmed both of those powers.[12] The Commission – like Congress – should similarly respect powers that stem from States' obligation to hold public property in trust for the public's use.

### A. Authority to Adopt Rules

The NOI adopts the position that the Commission has the authority, under Section 253, to engage in rulemaking to adopt rules that further define when a State or local legal requirement or practice constitutes an effective barrier to the provision of telecommunications service.[13] However, the topics addressed in the NOI extend beyond the scope of preemptive powers granted by Section 253(a) and cross into areas that are appropriately within the control of State and local governments. In Section 253 Congress only preempted local requirements that prohibit the ability to provide service. In addition, Congress adopted a "safe harbor" to preserve certain local rights-of-way requirements even if they were to run afoul of this requirement.

Section 253's only preemptive language appears in subsection (a):

> (a) In general
> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

If a local requirement were to violate subsection (a), it would still be lawful if it qualified under the safe harbors provided by subsections (b) or (c):

> (b) State regulatory authority
> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

[12] 47 U.S.C. § 253 (c).
[13] NOI at ¶ 109.

> (c) State and local government authority
> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

Subsection (d) then clarifies the Commission's role by providing that the Commission may only address issues under subsection (a) and (b), **not** subsection (c):

> (d) Preemption
> If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b) of this section, the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

While Section 253(a) is "a rule of preemption [that] articulates a reasonably broad limitation on state and local governments' authority to regulate telecommunications providers,"[14] that preemptive power is necessarily limited by Section 253(c). The preemptive effect of Section 253(a) only extends to State or local actions that fall outside the safe harbor of Section 253(c).[15] Thus, the Commission does not have authority under Section 253(a) to adopt rules that preempt activities that fall within the Section 253(c) safe harbor.

The restrictions on the Commission's ability to adopt rules preempting activities that fall within the Section 253(c) safe harbor are further supported by Section 253(d). As identified in the NOI, "Section 253(d) directs the Commission to preempt the enforcement of particular State or local statutes, regulations or legal requirements…."[16] Section 253(d) references only Section 253(a) and Section 253(b) – it does *not* reference Section 253(c). "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be

[14] Level 3 Communications, L.L.C. v. City of St. Louis, Mo., 477 F.3d 528, 532 (8th Cir. 2007).
[15] Id.
[16] NOI at ¶ 110.

implied, in the absence of evidence of contrary legislative intent."[17] As a result, the Commission does not have authority to adopt rules that infringe upon State and local authority guaranteed under Section 253(c).

Additionally, in its "initial" form, Section 253(d) stated: "If . . . the Commission determines that a State or local government permitted or imposed any statute, regulation, or legal requirement that violates or is inconsistent with *this section*, the Commission shall immediately preempt the enforcement of such state, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency."[18] The final, and current, form of Section 253(d) adopted by Congress instead states "any statute, regulation, or legal requirement that violates *subsection (a) or (b)* of this section."[19] Congress expressly removed reference to the entire section, which included subsection (c), and instead gave the Commission authority over violations of only subsections (a) and (b). By specifically excluding subsection (c), Congress did not give the Commission power to determine "fair and reasonable compensation."[20] That power lies with the courts.

The Eleventh Circuit directly addressed this question. It stated that:

> it is clear that subsection (d) [of 47 U.S.C. 253], despite its less-than-clear language, serves a single purpose—it establishes different forums based on the subject matter of the challenged statute or ordinance. Accordingly, we hold that a private cause of action in federal district court exists under § 253 to seek preemption of a state or local statute, ordinance, or other regulation only when that statute, ordinance, or regulation purports to address the management of the public rights-of-way, thereby potentially implicating subsection (c). All other challenges brought under § 253 must be addressed to the FCC.[21]

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[17] TRW Inc. v. Andrews, 534 U.S. 19, 28 (2001) (citing Andrus v. Glover Constr. Co., 446 U.S. 608, 616-617 (1980) (internal quotations omitted)).
[18] BellSouth Telecommunications, Inc. v. Town of Palm Beach, 252 F.3d 1169, 1191 (11th Cir. 2001) (emphasis added).
[19] 47 U.S.C. § 253(d) (emphasis added).
[20] BellSouth, 252 F.3d at 1191.
[21] Id.

The Commission does not have the authority under Section 253 to adopt rules regarding what constitutes fair and reasonable compensation.

Even if the Commission did have authority to adopt rules regarding what constitutes fair and reasonable compensation, it is not appropriate, nor prudent, for the Commission to micromanage the complex policy, technical, and marketplace decisions of States and local governments relating to the public rights-of-way. Local governments especially have the most inclusive and transparent procedures, with levels of community notification, public hearings, open public meetings, public data practices requirements, local citizen advisory commission recommendations followed by elected bodies decision-making, and prescribed appeal opportunities built into the process.

One-size does not fit all in our country. Communities are unique, and the local officials elected by the people know their communities best. Local elected officials are charged with balancing the needs and interests of their residents, property owners, businesses, and rights-of-way users/telecomm providers. Local governments also bear the critical responsibility and costs for public safety related to rights-of-way usage and coordination by multiple users.

State and local governments have been successfully promoting and encouraging the deployment of energy and telecommunications infrastructure advancements for over a century. Local governments in Washington have worked with providers to develop best practices and to support advancing technologies, because they understand the benefits to local economies and to local residents. State and local governments are laboratories for experimentation. This is an integral tenant of the federalist system, and not allowing it is a grave error. [22]

The Coalition has been disappointed to see public comments from members of the Commission and from industry and its trade associations generalizing about "bad actors" within

[22] Reeves, Inc. v. Stake, 447 U.S. 429, 441 (1980).

local government without naming the specific city or giving specific citations to dates, ordinance numbers, or supposed unfair or unreasonable compensation requirements. The Coalition requests that the Commission adopt a requirement that such accusations must be specific, accurate, and include city names and dates, so that local governments may respond accordingly.

Section 253(a) already allows telecommunications providers to challenge any local prohibition that has a practical effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.[23] If the telecommunications provider meets this burden, the state or local unit of government must then demonstrate that one of the safe harbor exceptions under Section 253, subsections (b) and (c), is triggered.[24] The Commission has stated that:

> when a local government chooses to exercise its authority to manage the public rights-of-way it must do so on a competitively neutral and nondiscriminatory basis. Local requirements imposed only on the operations of new entrants and not on existing operations of incumbents are quite likely to be neither competitively neutral nor nondiscriminatory.[25]

If the rights-of-way requirements violate Section 253(a) and do not meet the criteria of Sections 253(b) or (c), the provider may seek preemption. Federal courts have established a process for review under Section 253. First, there is a determination of whether there is a violation of Section 253(a). If so, then there is a determination whether the violation is permitted

[23] See generally, *In re California Payphone Ass'n, Opinion and Order*, 12 FCC Rcd. 14191 (1997), *In the Matter of The Public Utility Commission of Texas , 13 F.C.C.R. 3460,* and *Classic Telephone, Inc., Petition for Preemption of Local Entry Barriers*, 11 FCC Rcd. 13082 (1996).
[24] *See Id. Classic Telephone, Inc*.
[25] *In the Matter of TCI Cablevision of Oakland County, Inc.*, 12 F.C.C.R. 21396 (F.C.C. September 19, 1997). *See also* TCG Detroit v. City of Dearborn, 206 F.3d 618 (6th Cir. 2000) (City was willing to apply a fee to all providers but state law prevented application).

under Sections 253(b) and/or (c).[26] The Commission has also articulated several substantive criteria to provide guidance to municipalities regarding whether a legal requirement has the "effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service" under Section 253(a).[27] For example, the Commission recognizes that Section 253(a) bars legal requirements that materially: 1) increase the costs of some entities without necessity;[28] or 2) inhibit the ability of an entity to compete in a fair and balanced legal and regulatory environment."[29]

The process, as established by Congress and the Commission, is functioning properly and is not in need of revision or modification. When considering a specific local rights-of-way ordinance or other legal requirement, the burden is on the provider, or those seeking preemption, to demonstrate that the challenged rights-of-way regulation prohibits or has the effect of prohibiting a potential provider's ability to provide an interstate or intrastate telecommunications service under Section 253(a).[30] Parties seeking preemption of a local regulation must supply credible and probative evidence that the challenged requirement falls within the proscription of Section 253(a) without meeting the requirements of Section 253(b) and/or (c).[31] Since these telecommunications providers (cable and telecom operators) are the key providers of broadband

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[26] *In the Matter of The Public Utility Commission of Texas,* 13 F.C.C.R. 3460, 3480 (F.C.C. October 1, 1997), which provides:

> Under this approach, we first determine whether the challenged law, regulation or legal requirement violates the terms of Section 253(a) standing alone. If we find that it violates Section 253(a) considered in isolation, we then determine whether the requirement nevertheless is permissible under Section 253(b). If a law, regulation, or legal requirement otherwise impermissible under subsection (a) does not satisfy the requirements of subsection (b), we must preempt the enforcement of the requirement in accordance with Section 253(d).

[27] *See In the Matter of Classic Telephone, Inc*., 11 F.C.C.R. 13082, 13094 (F.C.C. October 1, 1996); *In the Matter of New England Public Communications Council*, 11 F.C.C.R. 19713, 19720 (F.C.C. April 18, 1997).
[28] *In the Matter of The Public Utility Commission of Texas,* 13 F.C.C.R. 3460, 3466 (F.C.C. October 1, 1997).
[29] *In the Matter of California Payphone Association,* 12 F.C.C.R. 14191, 14206 (F.C.C. July 17, 1997).
[30] *In the Matter of TCI Cablevision of Oakland County, Inc.,* 12 F.C.C.R. 21396, (F.C.C. September 17, 1997).
[31] Id.

services, Section 253 serves to protect such broadband providers from barriers to entry at the local level.

All of the broadband providers operating in the Coalition cities are telecommunications providers and enjoy the protections afforded by Section 253. In fact, when considering revisions to the local rights-of-way code, the Coalition cities are guided by Section 253 to make sure that all users are permitted a right to place facilities in the rights-of-way on fair and competitively neutral terms. The Commission and various courts have already provided cities with a list of issues appropriate for rights-of-way regulation which include:

1. Coordination of construction schedules.
2. Determination of insurance.
3. Indemnity requirements.
4. Establishment and enforcement of building codes.
5. Monitoring the various systems and utilities that use the rights-of-way to prevent interference between them.[32]
6. Regulating the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize notice impacts.
7. Requiring a company to place facilities underground, rather than overhead, consistent with the requirements imposed on other utility companies.
8. Requiring a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavations.
9. Enforcing local zoning regulations.
10. Requiring a company to indemnify the city against any claims of injury arising from the company's excavation.[33]

Federal courts have also provided clarification regarding what may not be included within a rights-of-way ordinance. Generally, the courts have found that "rights-of-way management means control over the rights-of-way itself, not control over companies with facilities in the rights-of-way."[34] With this principle in mind, courts have held that the following rights-of-way ordinance provisions may not be acceptable:

[32] *See Generally In the Matter of Classic Telephone, Inc.* for support of items 1-5.
[33] Id. The FCC quoted from the Congressional testimony of Senator Diane Feinstein, who offered examples of the types of restrictions that Congress intended to permit under Section 253(c) for support of items 6-10.
[34] City of Auburn v. Qwest Corp., 260 F.3d 1160, 1177 (9th Cir. 2001).

1. Regulations requiring the applicant to submit proof of its financial, technical and legal qualifications. [35]
2. A description of the telecommunication services to be provided.[36]
3. Regulation of stock transfers.[37]
4. Most favored community status – best available rates and terms.[38]
5. Unspecified franchise terms and ability to revoke a franchise based on unnamed factors.[39]

Providers have not complained that the rights-of-way requirements in the Coalition cities are unduly burdensome or in any way prevent the deployment of broadband services. This remains true despite the fact that the Coalition cities have sophisticated rights-of-way rules and regulations, permitting requirements, street restoration rules, insurance and indemnification obligations, and bond mandates.[40] Nevertheless, broadband providers routinely construct and upgrade their facilities in the rights-of-way of the Coalition cities. Broadband deployment is not slowed by rights-of-way regulations, but rather, in certain cases, by the providers themselves due to capital limitations or internal policies that may only authorize construction in specified areas of the Coalition cities where the provider can quickly obtain a return on investment.

The Coalition cities are not faulting the industry for making such business decisions or for limiting construction during an economic downturn, but any attempt to blame a lack of broadband deployment on the Coalition cities' rights-of-way regulations is simply inaccurate and unsupportable.

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[35] *See* Bell South Telecommunications v. Town of Palm Beach, 127 F. Supp. 2d 1348, 1355 (S.D. Fla. 1999). *See also* AT&T Communications v. City of Dallas, 8 F. Supp. 2d 582, 593 (N.D. Tex. 1998).

[36] *See* Bell South Telecommunications v. City of Coral Springs, 42 F. Supp. 2d 1304, 1309 (S.D. Fla. 1999). (The city does not have the authority to request information regarding systems, plans, or purposes of the telecommunications facilities.)

[37] *See* City of Auburn v. Qwest Corp., 260 F.3d 1160, 1177 (9th Cir. 2001).

[38] *See* TCG New York, Inc. v. White Plains, 125 F. Supp. 2d 81, 93 (S.D. N.Y. 2000) (Holding that a most-favored clause is akin to regulation of rates, terms and conditions of service unrelated to the use of public rights-of-way). *See also In re TCI Cablevision,* 12 F.C.C.R. 21396 ¶ 105(noting that most favored nation clauses are difficult to justify under § 253(c) on the grounds that they are within the scope of permissible local rights-of-way management authority.)

[39] *See* White Plains, 125 F. Supp. 2d at 92; City of Coral Springs, 42 F. Supp. 2d at 1306.

[40] *See Generally,* Seattle, Washington Municipal Code; Title 15 – Street and Sidewalk Use; Spokane, Washington Municipal Code; Title 12 – Public Ways and Property; Longview, Washington Municipal Code; Title 12 – Streets and Sidewalks.

### B. Rights-of-Way Fees

A State or local government may "require fair and reasonable compensation from telecommunications providers . . . for use of public rights-of-way."[41] This compensation addresses two monetary aspects related to the use of the public rights-of-way. First, compensation protects the citizenry from bearing the costs imposed by private parties' use of public property. Second, compensation assures residents continue as the beneficiaries of public property. Both aspects are fair and reasonable.

As the Commission acknowledged, "states and localities have many legitimate reasons for adopting fees."[42] Some of the legitimate reasons for local practices are to "protect public health and safety; encourage economic development; facilitate the efficient use of public property; promote a sustainable community; and dictate fair compensation for the private use of public property."[43] Part of the Coalition cities' responsibility is management of the streets, oversight of environmentally sensitive areas, platting of new subdivisions and leasing of public property.[44] To implement local practices designed to facilitate these responsibilities, the Coalition cities need to assess fees to adequately cover the associated costs.

Management of the public rights-of-way is a process involving numerous steps to ensure State and local governments protect the public interest and other legitimate goals. To do so, State and local governments gather and assess information about rights-of-way users and specific requests to access the rights-of-way. In Washington, this means receiving, evaluating, and processing rights-of-way permits.[45] The evaluation process is accomplished through a combination of internal and external resources. Complex rights-of-way permits often require

[41] 47 U.S.C. § 253 (c).
[42] NOI at 33.
[43] Tabin Berger, Brian, Local Coalition Defends Rights-of-Way Management, Compensation Practices, Government Finance Review 73, 74 (August 2011), *available at* http://www.gfoa.org/sites/default/files/GFR_AUG_11_73_0.pdf.
[44] Id.
[45] Wash. Rev. Code § 35.99.020-030.

assessment by engineers and construction professionals. After initial approval, States and local governments inspect and confirm that the access to the rights-of-way is accomplished in a manner that does not diminish citizens' ability to use public property or interfere with other (private) users of the rights-of-way. To do otherwise may well jeopardize the infrastructure investment of other rights-of-way users, including other telecommunications and broadband providers. Finally, the Coalition cities' responsibilities do not end once access is approved. Rather, the government must engage in ongoing monitoring and evaluation to make sure that private parties are not diminishing the public's use of public property or interfering with each other.

The costs associated with the local responsibilities go above the actual cost of upkeep and processing. If the private party does not cover this cost then the residents do, whether they use, or even have access to, the service provided. Unlike traditional public utilities, broadband providers are not obligated to provide service to all members of a community, nor are their rates subject to regulatory control. Broadband providers, while providing a valuable and desirable service, do so to earn a profit. In such circumstances, it is appropriate for residents to receive compensation for the use of property held for their benefit. Therefore, the cost of these rights-of-way management activities should be borne by the private parties seeking to use public property for their own profit and not subsidized by the broader citizenry.[46] Providers are using a public resource, the rights-of-way, as an integral part of their business. Similar to a private property owner, cities should be able to require a market-driven rent to be paid for the use of their property. Tax payers should not be required to subsidize private commercial entities without fair and reasonable compensation.

[46] NOI at ¶ 105-106.

The use of rights-of-way by providers may also cause a diminution in rights-of-way value that should be compensated. The rights-of-way are valuable public land. There are certain costs that can be easily itemized; however, there are other costs that cannot be easily itemized. For example, if a wire is installed under a sidewalk, driveway or road, often damage will emerge well after the installation permit and final inspection are completed. Damage resulting from directional boring or other installation techniques can result in significant long term costs incurred by cities. Once discovered, cities have little ability to determine which communications provider may be responsible for the damage. The result may also be a sidewalk, driveway or road in need of replacement far earlier than its anticipated useful life. When the State or local governments assess the costs of installation and repair, they cannot always determine these types of future costs that may be incurred due to the installation of communications infrastructure in the rights-of-way. It is this type of cost that State and local governments should be able to preemptively prepare for through fees above actual cost. Paying a fee above actual cost of maintenance, like rent, is not prohibitive of the ability of an entity to provide an interstate or intrastate telecommunications service. A fee above actual cost becomes prohibitive only when it is excessive, not simply because it exists.

Although many local governments currently charge certain cost-based fees, very few local governments use those fees to recover *all* costs associated with rights-of-way use. If a federal rule limited local governments to only recovering their costs, many local governments would have no choice but to hold telecommunications and broadband providers responsible for *all* costs properly attributable to such entities and to the installation of their communications infrastructure. This would likely entail significant fee increases which may well equate to fees calculated using other methods.

The Takings Clause of the Fifth Amendment to the U.S. Constitution bars the federal government from taking public land without just compensation.[47] When the federal government takes "independently held and controlled property of a state or of a local subdivision, the Federal Government recognizes its obligation [under the Fifth Amendment] to pay just compensation for it."[48] Although the Commission is not proposing a direct taking by the federal government, "a regulation becomes a taking when the government authorizes permanent, physical occupation by a third party."[49] Capping rights-of-way fees to only cover costs incurred by a State or local government to maintain and manage the public rights-of-way would constitute a taking without just compensation because there is more value to the land than simply reimbursing for the cost of construction or maintenance.[50]

Capping rights-of-way fees at cost would also contravene the explicit text of the Act. Section 253(c) provides a State or local government may "require fair and reasonable *compensation* from telecommunications providers . . . for use of public rights-of-way."[51] The text of Section 253(c) is the touchstone for assessing Congressional intent.[52] By choosing to allow State and local governments to assess *compensation* for the use of the public rights-of-way, Congress chose to allow for fees that exceed cost. If Congress had intended otherwise, it

[47] U.S. Const. amend. X; US v. 50 Acres of Land, 469 U.S. 24, 105 S.Ct. 451, 83 L.Ed. 2d 376 (1984) ("The Fifth Amendment requires that the United States pay 'just compensation' . . . whenever it takes private property for public use."); United States v. Carmack, 329 U.S. 230, 67 S.Ct. 252, 91 L.Ed. 209 (1946).
[48] Carmack, 329 U.S. at 242, 67 S.Ct. at 257; *see also* 50 Acres of Land, 469 U.S. at 30, 105 S.Ct. at 455-56 ("[I]t is most reasonable to construe the reference to 'private property' in the Takings Clause of the Fifth Amendment as encompassing the property of state and local governments when it is condemned by the United States.").
[49] Gulf Power Co. v. U.S., 187 F.3d 1324, 1328 (11th Cir. 1999) (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982).
[50] NOI at ¶ 103.
[51] 47 U.S.C. § 253(c) (emphasis added).
[52] Pennsylvania Dep't of Public Welfare v. Davenport, 495 U.S. 552, 557-58 (1990) ("[S]tatutory interpretation begins with the language of the statute itself."); Hartford Underwriters' Ins. Co. v. Union Planters Bank, NA, 530 U.S. 1, 6 (2000) ("[W]e begin with the understanding that Congress says in a statute what it means and means in a statute what it says there.").

clearly could have done so.[53] Compensation means "[r]emuneration or other benefits received in return for services rendered; esp., salary or wages."[54] Benefit means "advantage; privilege . . . profit or gain."[55] Recovering the costs imposed by for-profit, private entities' use of public property does not yield a benefit, advantage, privilege, profit or gain; it merely ensures that citizens are not *harmed* by private parties' use of property held in trust for citizens' benefit. Only through the payment of fees that exceed cost do residents receive *compensation* for the use of property held in trust for their benefit.

In fact, "the term 'compensation' has long been understood to allow local governments to charge rental fees for public property appropriated to private commercial uses. It is thus doubtful that Congress, by the use of the words 'fair and reasonable compensation,' limited local governments to recovering their reasonable costs."[56] This rationale is further supported by the Sixth Circuit Court of Appeals decision in *TCG Detroit v. City of Dearborn* which upheld a district court decision finding that a four percent franchise fee was permissible under Section 253(c).[57]

The *Dearborn* decision supports the argument that cities are not limited to recovering only their "costs" but rather may impose reasonable "rent" or compensation for the use of rights-of-way. Furthermore, the *Dearborn* decision helps to clarify the requirements in Section 253(c) mandating "non-discriminatory" treatment. In the *Dearborn* case, Ameritech operated under a 100-year-old authorization that predated state franchising. TCG, a competitive access provider, argued that a four percent franchise fee was discriminatory because such fee was not also

[53] *See, e.g.*, 47 U.S.C. § 224(d) (limiting the compensation for pole attachments to the cost of providing attachments).
[54] Black's Law Dictionary 322 (9th ed. 2009).
[55] Black's Law Dictionary 178 (9th ed. 2009).
[56] Id.
[57] *See* TCG Detroit v. City of Dearborn, 205 F. 3d 618 (6th Cir. 2000) (The district court's decision can be found at 16 F. Supp. 2d 785 (E.D. Mich. 1998)).

imposed upon Ameritech. The right to charge these rents is protected by federal law against FCC intrusion (*see, e.g.* 47 U.S.C. § 546, establishing cable franchise fee; 47 U.S.C. § 224, restricting FCC authority to regulate fees for municipally-owned rights-of-way, poles and conduit; 47 U.S.C. § 253(c), protecting local authority to obtain compensation for use of rights-of-way).[58]

Congressional intent that fair and reasonable compensation for the use of public rights-of-way is not limited to cost can also be inferred from the treatment of cable operators under Sections 621 and 622 of the Act. Section 622 permits State and local governments to assess a franchise fee of up to five percent of the cable operator's gross revenues.[59] Payment of this fee entitles the cable operator to use of the public rights-of-way.[60] Cable is the primary source of broadband in the United States,[61] which indicates that the non-cost based fees authorized under Section 622 are not prohibiting the provision of broadband service. The evidence, both in the language of Congress and the facts on the ground, indicates that fair and reasonable compensation need not be interpreted as limited to the public rights-of-way management costs.

The significant broadband market share obtained by cable operators indicates that gross revenue-based fees are not excessive, do not prohibit the provision of telecommunication service and can be fair and reasonable. Other options to receive fair and reasonable rent also exist such as fee per foot (Michigan) or fee per line (Texas). Most importantly, any Commission action that serves to disrupt the existing fee structure in cities would be immediate and consequential; and the effect on the local government could well be

[58] City of St. Louis v. Western Union Telegraph Co., 148 U.S. 92, 99 (1893), *op. on rehrg.*, 149 U.S. 465 (1893).
[59] 47 U.S.C. § 542 (b).
[60] 47 U.S.C. § 541 (a)(2).
[61] Federal Communication Commission Industry Analysis and Technology Division Wireline Competition Bureau, INTERNET ACCESS SERVICES: STATUS AS OF JUNE 30, 2016 at Figure 22 (Apr. 2017) (identifying cable modem as accounting for 82.8% of fixed broadband connections of at least 25 Mbps downstream and 3 Mbps upstream as of June 30, 2016), http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0503/DOC-344499A1.pdf.

disastrous, leading to potential cuts in local budgets that could impact public safety and critical rights-of-way management and coordination of multiple providers, and so on.

### C. Deployment Moratoria

In a rapidly evolving realm such as technology, moratoria play an important role in allowing officials to understand the technology used and private party requests before making a decision. The public and the telecommunications providers are better served through short moratoria than hasty action. A short moratorium on the frontend of a project may save a significant setback after the project begins. Moratoria also allow local officials to consider the legitimate concerns of members of the public, such as health, public safety and environmental issues, and how best to responsibly address them.

Broadband technologies are continuously evolving, with business models and infrastructure often leading the way.[62] The Coalition, consistent with Washington law, has exercised its rights to regulate the rights-of-way and has attempted to do so in a flexible, practical manner. Yet, there are instances where technological or business innovations outpace regulations. For example, increased demand for mobile broadband has caused some providers to pursue "small cell" deployments in the rights-of-way. This technology must be in relatively close proximity to users, resulting in some providers proposing to place monopoles of 150 feet or higher in front of residences or in historic downtown areas.[63] In such instances where the technological innovation has caused some providers to dramatically deviate from past business

[62] See In the Matter of Technology Transitions, Report and Order, WC Docket No. 05-25, Federal Communications Commission 2-3 (2015), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-97A1.pdf ("Our actions today further the technology transitions underway in our Nation's fixed communications networks that offer the prospect of innovative and improved services to consumers and businesses alike.").

[63] Flinchpaugh, Brian, Lake Saint Louise imposes six-month moratorium on new telecommunications towers, Mid Rivers NewsMagazine, *available at* http://midriversnewsmagazine.com/2016/04/28/59851/lake-saint-louis-imposes-six-month-moratorium-on-new-telecommunications-towers (April 28, 2016) ("Lake Saint Louis has imposed a six-month moratorium on the processing of applications and approval of new communications cell towers to allow the city to review how it can regulate them . . . A six-month moratorium was one of the few options left open to local governments by the legislation.").

practices, moratoria can be helpful by allowing local governments to better understand new technologies and business models. Moratoria also allow State and local governments to make the correct decision and avoid establishing bad precedent that will be utilized to support subsequent requests. Just as the Commission is seeking input from interested stakeholders in this proceeding before the Commission determines how best to address pending issues, so too should cities have the flexibility to investigate and research the impact of new technologies and new installations in the rights-of-way, in order to most prudently and effectively balance the needs of all stakeholders for the long term. Sometimes local governments are first made aware of the need to investigate and research local impacts of these cutting edge technologies upon the receipt of applications from industry, and therefore reasonable moratoria may be necessary.

Although moratoria may impose a *temporary* pause on development, if used appropriately, moratoria ultimately promote the deployment of infrastructure by making sure all parties (providers, regulators, residents, users, businesses, and property owners) are operating from a common, acceptable set of rules. Eliminating moratoria from the regulatory toolbox could lead to situations where technological or business advances are implemented without appropriate regulatory controls, leading to frustrated residents and the potential for overcorrection that would ultimately reduce deployment.

### D. Coalition Rights-of-Way Regulation

The NOI identifies Section 253(a) as a rule of preemption that limits State or local regulatory powers.[64] But the preemption rule does not "affect[] the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for

[64] NOI at ¶ 100 (citing Level 3 Communications, L.L.C. v. City of St. Louis, Mo., 477 F.3d 528, 532 (8th Cir. 2007)).

use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government."[65] The State of Washington has adopted a regulatory framework that falls outside of the Section 253(a) preemption rule. Thus, as it relates to Washington, it is unnecessary for the Commission to adopt rules pursuant to Section 253.

Washington allows that cities and towns may require service providers to obtain a permit and that an application must be acted on within one hundred twenty days.[66] Additionally, it prohibits a city or town from "unreasonably deny[ing] the use of the rights-of-way by a service provider for installing, maintaining, repairing, or removing facilities for telecommunications services or cable television services."[67] These provisions clearly bring Washington law within the Section 253(c) safe harbor.[68]

The three cities joining these comments are Longview, Seattle, and Spokane. Each of these cities has ordinances in place concerning the rights-of-way that are consistent with federal law.[69]

Longview requires a valid rights-of-way occupancy permit before use of a right-of-way.[70] The permit application includes information such as engineering plans, network maps of facilities throughout the city, description of the facilities and any interconnection with public utilities (non-exclusive list).[71] The annual fee is set by the city council.[72]

Seattle also requires a permit be obtained.[73] An authorizing official may require a plat

[65] 47 U.S.C. § 253 (c).
[66] Wash. Rev. Code §§ 35.99.020-030.
[67] Wash. Rev. Code § 35.99-040(1)(d).
[68] NOI at ¶ 100 (citing Level 3, 477 F.3d at 532).
[69] 47 U.S.C. § 253 (a).
[70] Longview, Wash. Code § 12.30.010.
[71] Longview, Wash. Code § 12.30.040.
[72] Longview, Wash. Code § 12.30.050.
[73] Seattle, Wash. Code § 15.32.010.

drawn to an accurate scale, exact location of work and other information.[74] In addition to permit application fees, other fees may be assessed that are "reasonably necessary to investigate and process the application for construction work, inspect such work, secure proper field notes for location, plat such locations on the permanent records of the Department, and inspect or re-inspect as to maintenance, during the progress of or after the repair of, any construction placed under permits previously issued."[75]

Spokane, likewise, requires a master or use permit be obtained before use of the rights-of-way.[76] Spokane's application process is similar to Seattle and Longview. It requires a demonstration of an applicant's technical, legal, and financial ability to construct and operate a proposed telecommunications facility among other requirements.[77] Spokane is required to act on a use permit application within thirty days of receipt.[78]

There is no need for the Commission to implement federal rules to govern access to the Washington rights-of-way as state and local rules already exist which adequately address reasonable access and fair compensation for use access.

### E. Conditions of Access

State and local governments retain the authority to "manage the public rights-of-way."[79] Imposing conditions upon access is necessarily related to the management of the rights-of-way.[80] But the management of the public rights-of-way must be "on a competitively neutral and nondiscriminatory basis,"[81] which means treating similarly situated rights-of-way users similarly.

[74] Seattle, Wash. Code § 15.32.030.
[75] Seattle, Wash. Code § 15.32.060.
[76] Spokane, Wash. Code § 12.09.030.
[77] Spokane, Wash. Code § 12.09.040.
[78] Spokane, Wash. Code § 12.09.050(B).
[79] 47 U.C.C. § 253 (c).
[80] Tabin Berger, Brian, Local Coalition Defends Rights-of-Way Management, Compensation Practices, Government Finance Review 73, 74 (August 2011), *available at* http://www.gfoa.org/sites/default/files/GFR_AUG_11_73_0.pdf.
[81] 47 U.C.C. § 253 (c).

Cable operators and broadband providers are similarly situated when it comes to their use of the public rights-of-way.[82] Therefore, the conditions applicable to cable operators should also be applicable to broadband providers.

One of the important policy goals reached through State and local governments' authority to impose conditions of access is the goal to reach low income areas. State and local governments can condition access to rights-of-way on telecommunications or broadband being provided to low income, underserved and unserved areas. The importance of closing the digital divide and ensuring access to the information economy for all residential and business districts of a community are well documented. Limiting or prohibiting local governments from addressing the needs of disparate communities or neighborhoods within our cities may well result in providers targeting only more affluent areas and intentionally avoiding areas that may struggle to pay for advanced services.

The Coalition also notes that Washington has adopted laws regarding conditions of access. Under Washington law, local governments cannot

> (a) Impose requirements that regulate the services or business operations of the service provider, except where otherwise authorized in state or federal law;
> (b) Conflict with federal or state laws, rules, or regulations that specifically apply to the design, construction, and operation of facilities with federal or state worker safety or public safety laws, rules, or regulations;
> (c) Regulate the services provided based upon the content or kind of signals that are carried or are capable of being carried over the facilities, except where otherwise authorized in state or federal law; or
> (d) Unreasonably deny the use of the rights-of-way by a service provider for installing, maintaining, repairing, or removing facilities for telecommunications services or cable television services.[83]

[82] Cf. Selyukh, Alina, U.S. Internet Providers Hit with Tougher Rules, Reuters, Feb. 26, 2015, *available at* http://www.reuters.com/article/us-usa-internet-neutrality-idUSKBN0LU0CA20150226.
[83] Wash. Rev. Code § 35.99.050(1).

Additional rules from the Commission may end up being duplicative of Washington requirements and lead to confusion among both providers and local government.

## III. CONCLUSION

The Coalition recognizes the obvious benefits of broadband deployment in their communities. The Commission's NOI incorrectly assumes that municipalities are standing in the way of broadband deployment and are serving as "barriers to entry." In fact, as these comments have demonstrated, the exact opposite is true. Municipalities have actively promoted broadband deployment in Washington and have required providers to offer citywide services rather than being allowed to cherry pick the most attractive portions of a community.

To protect the health and safety of businesses and residents, as well as to protect the existing facilities of local governments and other rights-of-way users, municipalities must have the ability and local authority to ensure the efficient use of the rights-of-way. This can best be accomplished through the development of effective LOCAL policies and management practices and the ability of municipalities to levy fees to not only recover costs, but to receive fair and reasonable compensation from rights-of-way occupants for the private, for-profit, use of these valuable public assets.

Respectfully submitted,
**WASHINGTON COALITION**

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